

Moving towards Lengthy Life Imprisonment? A Comparative Study on the Alternative Sanctions to the Death Penalty in the United States and China

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Introduction

Conducting socio-legal analysis on the use of severe penal sanctions in two different yet comparable jurisdictions may offer unique opportunities. It may appear counter-intuitive to recognize that China and the United States – two countries with fundamentally distinct political regime, legal tradition and social structure - share some common features in their penal institutions and policy. Indeed, we are normally habituated to thinking our own penal culture and legal institutions as unique and, to a certain extent, singular with its distinct characteristics almost impossible to compare with other geographically-distant and legally-unfamiliar places. Nonetheless, it is sometimes difficult not to take notice of, and be enthusiastic about the penal developments elsewhere which indicate a dimension of comparability, in spite of their different characteristics. As David Nelken (2010) suggested, the benefits and merits of a comparative methodology¹ can be gained not only from comparing 'like with like', but also comparing like with unlike .

This research project involves efforts that focus on the trends and underlying forces associated with the evolution of the most severe penal sanctions – the death penalty and its alternative penalty. China, in the mid-2000s, entered an era where its top judiciary tinkers with its death penalty machinery, in an attempt to bring down the volume of capital sentences and executions on a case-specific basis. From 2007 to 2011, the number of executions has dropped by approximately 50%. Coincided with this trend is a growing emphasis placed by the Chinese judiciary, legislature, legal enforcement and academia on increasing the use of fix-term sentences and life sentences. This general trend in China seems to correspond with the trajectory of penal development in the United States since the 1970s, which can be characterised by a growing use of incarceration as the main penal sanction as well as subjecting the administration of capital punishment to intensified legal regulation.

But what precisely happened in the United States? The number of people sentenced to LWOP quadrupled nationwide between 1992 and 2012 (American Civil Liberties Union, 2013). Currently, one in every nine inmates incarcerated serving a life sentence and on third of this population of lifers have no prospect for parole or release. A persistent increase at the top of the penal hierarchy is particularly noteworthy given overall drop of prison population from 2009 to 2012 and the steady decline in incidents of crime since 1990s. In New York, a 19.6% drop in prison population occurred with a 249% increase in LWOP population while in New Jersey, with the rate of incarceration decline by 16%, the number of prisoners serving parole ineligible life imprisonment grew by 232%. (Hoyle & Miao, 2014)

An observation like this leads us to infer the possibility that the current state of criminal justice policies and practices in the United States may be harbingers for future Chinese penal development. More specifically, two questions then arise: first, as China moves

¹ It is essential for comparative criminology to move beyond the two opposing yet interrelated dangers - ethnocentricism versus relativism. The former assumes our values are universally desirable for others. The latter takes on a pessimistic tone that we are incapable and ill-positioned to understand and evaluate others' penal values and practices. To get beyond this unhelpful dichotomy, great care needs to be paid to studying the causes and pathways leading to similarities and differences between different penal jurisdictions. (Nelken, 2009)

towards further restriction of its use of capital punishment, will it embrace the exponential use of LWOP as a means to ease concerns about and resistance to death penalty abolition, in a similar way as the United States since the 1970s? The second question is more speculative, yet no less significant: will further progress towards abolition of the death penalty lead to a continuous expansion of long-term imprisonment, or even the emergence of an American-style carceral state, in China?

After a broad stroke introduction in this section, the second part of this research traces the evolution of harsh penal punishments in these two countries. That both countries follow a similar logic of penal development in the recent past, notwithstanding different social, political and legal conditions, furnishes a basis for this comparative study as well as for predicting future trajectory of development in China. In the same section, I attempt to summarize a set of institutional dynamics, penal strategies and cultural attitudes shared by the two countries and link the research subject to these common characteristics. Section Three delineates differences in both countries - political regime, state structure, legal mechanism and traditions - which might affect and shape the course of penal development towards entrenching long-term incarceration. Taken together, it is the hope that this comparative research will provide insights for us to rethink the states' harsh approaches to criminal justice, and to locate possible sources of punitiveness and leniency² that shape contemporary penal thinking and policies.

Entrenched Incarceration, Rising Penal Populism and A Regulated Capital Punishment Complex

In comparison with the enormous body of literature on the use of the death penalty in the United States, relatively little attention has been paid to its alternative form of punishment – life imprisonment with the possibility of parole (LWOP) - which has been lurking in the shadow of high-profile anti-death penalty discourses and activism for decades. The conventional view holds that the progressive worldwide replacement of the death penalty with lengthy incarceration has yielded social, economic or political outcome that is widely recognised as necessary and desirable. To some extent such optimism has already been tempered by sobering scholarly analysis of the problematic expansion of the carceral state in the U.S. (Gottschalk, 2006) and the popularization of life imprisonment on a global scale (van Zyl Smit, 2002).

In particular, an emerging scholarship on the use of LOWP in the United States suggests that the death penalty is hardly uniquely 'cruel and unusual' (Appleton & Grøver, 2007; Feld, 2008; Lane, 1993; Nellis, 2010; Ogletree & Sarat, 2012; Wright Jr., 1990). In line with enriched academic debate on the issue, recent Supreme Court jurisprudence in *Graham v Florida* aligned the threshold for proportionality review in capital cases and LWOP cases involving juvenile defendants, under the rubric of Eighth Amendment 'cruel and unusual' clause (Barkow, 2012). The majority opinion of the Court linked the impact of the death penalty with LWOP imposed in juvenile cases, concluding that 'In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply.'³

² This said, I would like to add an important caveat that a focus on the high end of the penal hierarchy cannot be treated as the index of punitiveness. The subject of research here represents merely one end of the full spectrum of penal sanctions.

³ *Graham v. Florida*, No. 08-7412 (U.S. May 17, 2010).

These developments raised the hope that more informed debate can be generated to evaluate the nature and consequences of a form of harsh punishment which has evaded the focus of academic gaze. Yet the first question raised in the Introduction remains unanswered: Will LWOP be a necessary step towards the abolition of the death penalty in China? In order to answer this question, even in part, a closer look is required at the broader context of developments in the fields of capital punishment and incarceration in the United States and China.

For the past decades, some of the most distinguished criminologists focused their research on a 'punitive turn' or a rise in punitiveness (Christie, 2000; Garland, 1985, 2001; Lacey, 2008; Pratt, 2000, 2002; Simon, 1995, 2007; Wacquant, 2001, 2010) in the Anglo-American penal policy and practices. At this frontier of criminological research, it has been explained that the punitive drift since the 1970s has been the outgrowth of widespread changes in social and economic conditions in late-modern societies (Garland, 2001). In particular, a new penalty has been associated with a shift away from welfarist-rehabilitative mode of criminal justice administration and towards harsh penal legislation, tougher law enforcement, and growing prison population.

According to 2012 figures, the United States has the highest prison population rate in the world, 716 per 100,000 of the national population (Walmsley, 2013). Between 1978 and 2009, the number of prisoners held in federal and state facilities in the United States increased almost 430% (Carson & Golinelli, 2013). There is little doubt that the rise of LWOP has contributed to this dramatic rise in mass incarceration. In fact, LWOP prisoners comprise of the most rapidly growing prison population. The number of people serving LWOP increased from a number the American Law Institute describes as "vanishingly small" in the 1960s to more than 49,000 prisoners in 2012—one out of every 30 people in prison—are serving life-without-parole sentences (American Civil Liberties Union, 2013).

In an ironical twist, despite that more states joined the abolitionist camp, the number of executions in the United States steadily increased throughout the last two decades of the 20th century from 1 in 1977 to 98 in 1999. The number of death sentences and LWOP population rose hand in hand. Although the volume of executions in the past few years has declined to a historical low of 39 in 2013 (Snell, 2013), there is no evidence that the exponential rise in the LWOP population is linked to a relatively small number of decrease in executions. The reform of the death penalty seems to have a very high cost. And the reform may well have reproduced or exacerbated problems that it sought to resolve.

On many different levels, the Chinese pathway towards lesser use of capital punishment bears a close resemblance to that of the United States. Interestingly, since late 1970s, during the process of a profound economic-social transformation from totalitarianism to crony-capitalist authoritarianism in China, there has also been a strong spike in the use of penal sanctions. Coincided with a decline in welfare provision and state intervention is a declining faith in rehabilitative programs and growing resort to excessive punitive approaches aimed at achieving deterrence and incapacitation. The fact that penal authorities resorted to cyclical Strike Hard Campaigns (Curren, 1998; Tanner, 1999; Trevaskes, 2003) as a routine way to enforce criminal law and, as a result, to impose excessively punitive sanctions on criminal offenders is an evident example of this shift in penal thinking and policy.

Thus the last two decades of the 20th century saw a concurrent increase in the use of capital punishment and incarceration in China. From 1978 to 2012, prison population in China has increased 267% from around 0.62 million (Hu, 2003) to 1.66 million (National Bureau of

Statics of China, 2013). Although the figures of executions and death sentences are strictly held as national secrets, sources of estimated data suggest that the Campaigns led to rising tides of executions and that the figures rose to historical peak around the turn of the century (Hood, 2002; Johnson & Zimring, 2009; Nathan & Gilley, 2003). Even with the decline in capital sentences and executions by 50% from 2007 to 2011 (Dui Hua Foundation, 2011), the annual number of executions in China still probably exceeds the figures of rest of the retentionist countries combined (Bakken, 2007).

Therefore, it seems that China and United States share a quantitatively similar pattern in the development of highly punitive climates. The increasing reliance on extremely harsh penalties, such as the death penalty and life imprisonment, are integral to this process. Given the sheer size of China's annual executions and death row population, its current 1.35 million prison population⁴ (Walmsley, 2013), and that China is still at an early stage towards further and substantially limiting its use of capital punishment, concerns about the prospect are not unfounded. Taking these factors into consideration, we may arrive at a tentative hypothesis that it seems to be likely that China bound to end up with something like the bloated US penal system. This estimate, nevertheless, is subject to revisions and the test of further empirical investigation.

This brings me to another common feature in the administration of criminal justice in both China and the United State, which may shape and define their pathways of penal development, namely penal populism. Penal politics in both China and United States are saturated with populism. The notions of 'penal populism' (Pratt, 2007) or 'popular punitiveness' (Bottoms, 1995), despite being criticized as thinly-theorized (Matthews, 2005), has gained wide appeal among criminologists. The fact that it has sprouted and flourished in the Chinese authoritarian political-penal institutions as well as democratic social milieu in the United States suggests that academic attention on the topic will bring more light to our understanding of common propensities (and perhaps differences too) between Chinese and American penal regimes.

It has been well recognized that American penal policy-making is profoundly populist and lacks institutional insulation from politicians driven by electoral interests and media obsessed with playing on fears of crime (Barker, 2009; Garland, 2001; Franklin E Zimring, 1996). A similar logic can be used to explain why penal populism has gained prominent status in Chinese criminal justice policy making during the past few decades. Politicians and penal authorities in China are often tempted and pressured to respond to popular sensibilities and emotions (Liebman, 2005, 2007). Politicians and political organizations do so out of fear that ignoring expressions of popular discontent may lead to social unrest. Penal authorities bring their decisions in line with populist demands and perceptions because of the fragile autonomy of legal institutions and their need to seek public support. In an authoritarian regime, penal policy making becomes an important source of political legitimacy. To a certain extent, the delivery of public satisfaction has become more important than the delivery of justice and the rule of law.

Hence, in the institutional environment of both China and the United States, penal populism has been inextricably associated with and indeed instrumental to fuelling the 'punitive turn' in recent decades. A well-documented research shows that when LWOP offered as an

⁴ This figure includes detained prison population only. The number of prisoners under pre-trial detention or administrative detention in jail or other facilities has not been included. Neither is the volume of prisoners on parole, probation and other community supervision included.

alternative, public support for the death penalty declines significantly (Bohm, 2003; Bowers, Vandiver, & Dugan, 1994; Cullen, Fisher, & Applegate, 2000; McGarrell & Sandys, 1996). It has been wrongfully inferred from the comforting perception that LWOP is a lesser evil that the LWOP is a lenient replacement of the death penalty and therefore endorsement of LWOP is desirable. Over the years, public support for LWOP has grown to rival that of the death penalty (GALLUP, 2010).

Nevertheless, it is not solely the state of public opinion on the issue that determines the course of penal evolution. In the current ambient of penal populism in the United States, election-seeking politicians and profit-driven media have kept a finger on the pulse of public sensibilities and advocate bringing penal legislation and policy in line with the state of public opinion. The widespread public approval of LWOP, combined with the dynamics of penal politics, underpins its entrenchment and legitimation in practice. As state above, decision making in the arena of criminal justice in China exhibits very similar dynamics.

And this brings me to my last point in this section, i.e. the trajectories of death penalty reform in both countries. An essential commonality emerges from considering their respective experiences of moving toward a more restricted use of capital punishment – both countries embrace a progressive judicial regulation of the death penalty machinery. In the United States, the development of death penalty jurisprudence in the aftermath of *Furman v. Georgia*, seems to create a bifurcated, two-track system for capital and non-capital defendants (Barkow, 2009; Garland, 2010: 11; Steiker & Steiker, 2008: 159). Under the ‘death is different’ doctrine⁵, the Eighth Amendment provide ‘super due process’ protection (Margaret Jane Radin, 1979-80) for capital defendants to reduce the risk of error, an almost inevitable built-in feature of the machinery of death. Such a regime limit an otherwise systemic, wholesale challenge to the death penalty to a case-by-case scrutiny (Sarat, 1998).

In addition to concerns about the efficiency and costs, subjecting the administration of capital punishment to complex legal rules - through promises that capital defendants receive extra protection and preferential access - dampens down moral ambivalence surrounding the use of capital punishment, and thus, paradoxically, entrenches the use of the death penalty (Bedau, 2005; Steiker & Steiker, 1995; Weisberg, 1983). The reasoning that death is qualitatively different from other forms of penal sanctions also legitimates the use of LWOP and shields them from proper scrutiny. Crudely speaking, judicial efforts directed at taming capital punishment have been achieved at the cost of lowering or neglecting procedure protection for noncapital defendants. Interestingly, the two-track system also operates outside of the court room. Anti-death penalty activists are sometimes short-sighted visionaries. They seek to eliminate the death penalty, oblivious or wilfully blind to problems associated with its supposedly more humane alternative and possible collateral consequences of this reform process. The marriage between anti-death penalty movement and tough-on-crime conservatives (Steiker & Steiker, 2008) has significantly emboldened the

⁵ See, for example, *Graham v. Florida*, 560 U.S. 48 (2010) (Thomas, J. dissenting) (“Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment” and that there has been a ‘bright line’ between capital and noncapital sentencing); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (majority opinion holding it cruel and unusual to punish retarded persons with death is “pinnacle of . . . death-is-different jurisprudence”); *California v. Ramos*, 103 S. Ct. 3446, 3451 (1983) (“qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny” for capital sentences); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (death is qualitatively different from imprisonment); *Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Stewart, J., concurring) (“penalty of death differs from all other forms of criminal punishment, not in degree but in kind”).

use of long-term incarceration and, to a certain extent, the carceral state (Gottschalk, 2006: 232).

From the mid-2000s onwards, China has also developed a bifurcated system which classifies criminal adjudication into capital and non-capital proceedings. In capital cases, evidence are more carefully scrutinized, access to relatively adequate legal representation is provided, open-court trials are introduced to enhance transparency, and an extra review procedure by China's top court is made available to defendants. None of these enhanced legal standards have been applied in noncapital proceedings. Although we may make an optimistic prediction that the advent of China's death penalty reform will usher in a new era for the Chinese criminal justice regime characterized by greater predictability, accuracy, procedural fairness and respect for the rule of law (Cohen, 2007; Johnson & Zimring, 2009: 279), constrained by a shortage staff and financial resources, guarantee of special protection for capital offenders may be offset by saving spending on noncapital cases⁶.

The outcome will be at least threefold. First, the assumption that capital offenders enjoy 'perfect' procedural safeguards and this 'comparative advantages' thesis substantially undermines the normative force of abolitionist arguments. Second, the legal entitlements of noncapital offenders may be further weakened to an extent they become the 'indirect victims' of a well-intended penal reform. Third, the 'death is different' thesis facilitates the merger between anti-death penalty forces and conservative advocates for widening the net of penal punishment. In exchange for support for or tolerance of narrowing the scope and scale of capital punishment, tougher sanctions may be imposed on crimes with a lesser gravity, which are at the lower end of the penal spectrum, as well as ex-capital crimes which were rarely punished with the death penalty in the pre-reform era.

Recently, China's death penalty reform has led to a shared consensus across the judicial, legislative and law enforcement circles that the use of life imprisonment needs to be toughened, in order to pacify public resistance to further decreasing the use of capital punishment. Interestingly, an alliance between reform-minded scholars preoccupied with the death penalty reform agenda and conservative legal professionals resisting the reform progress has also been formed to endorse longer prison terms (Qu, 2004). As a result, they champion the assumption that in China, 'the death penalty is too severe and the "life sentences" are too lenient' (Chen, 2007; He, 2010; Zhao, 2007). The notion of 'life sentences' lumps together a whole series of non-capital punishment including suspended death sentences - which is a workable alternative to the death penalty in China - life imprisonment and other forms of fix-term sentences.

In 2011, the Supreme People's Court, through the Eighth Amendment to the Criminal Law, restricted the conditions under which a suspended death sentence can be commuted to a lesser punishment in cases involving serious crimes such as murder, rape, robbery, and kidnapping. Under the new rule, defendants subject to a suspended death sentence will have to spend at least 25 years in prison in addition to the initial two-year probationary period (Johnson & Miao, 2014 forthcoming). During the past few years, proposals by scholars to introduce LWOP as a substitute for capital punishment in China have also garnered increasing attention (Johnson & Zimring, 2009).

⁶ There are, of course, other possible avenues to compensate the diversion of legal resources to capital trials. State level authorities may allocate special budgets for capital trials. Another possibility, although less likely, is that procuratorates and law enforcement departments may fork out a portion of their fair share of resources to courts hearing capital cases, despite growing prison population and rising annual criminal caseload in China.

That these newly introduced mechanisms still seem relatively lenient, in comparison with the drastic increase in the use of LWOP in the last two decades in the United States. This may be due to the fact that China's capital punishment reform has only taken the very first step to reducing the use of capital punishment. There are still 55 capital offenses in the criminal statutes and most of the capital offenses abolished during the reform were rarely used in practice before the reform. After all, a considerable number of violent criminal offenses, for instance, homicide, rape, robbery, kidnapping, intentional causing harm to the person, etc. and non-violent crimes, such as drug offenses and corruption, are still subject to the death penalty in China today. And they are the core source of capital sentence and executions.

In comparison with the relatively smaller number of executions in the United States, China is on the maximum of the execution spectrum. As the death penalty reform progresses and further initiatives become institutionalized, there will be even stronger public resistance. It remains to be seen whether LWOP will be adopted as a *quid pro quo* for the abolition of severe violent crimes, homicide for instance. But one thing for sure, the progress will depend, to a large extent, on political and media agendas and their interpretation of the public opinion.

Governmental Structure, Penal Mechanisms, and Legal Traditions

Through an effort to depict and evaluate the similarities between the penal practices in the United States and China relevant to the topic of this article, the section above aims to bring to the Chinese debate insights from the American experience. Despite the many common features between the penal discourse, reform dynamics and development pathways in the two countries, nonetheless, this research does not attempt to develop a deterministic argument that China is set on the path to follow the American example. There are factors which suggest the possibility of a different prospect in China, a progressive reform involving lesser reliance on long-term incarceration (including various forms of life imprisonment, in particularly irreducible life imprisonment) in exchange for significant decline, and finally and hopefully, elimination of capital punishment. To this effect, this section will focus on contrasting factors between the two countries, in the hope to exemplify the possibility of maintaining a less punitive climate. This set of variables which influence penal decision making in both countries include systems of government, the provision and structure of penal code, and legal traditions relating to law enforcement.

Different institutional dynamics associated with state systems inform penal discourses. In the United States, the central loci of counter-majoritarian law-making power, namely the Supreme Court, is itself subject to perennial controversies revolving around the tensions between state sovereignty and centralized authority (Brennan, 1977; Friedman, 1998; Rehnquist, 1986; Whittington, 2005). Underneath the US Supreme Court's 'evolving standards of decency' jurisprudence⁷, which captures its abolitionist efforts (from the 1960s to *Furman*) and then its endeavour to regulate states' use of capital punishment (from *Gregg* onwards), are the conflicts between judicial activism to guarantee individual rights and the interests of decentralized state institutions. Even on the assumption that the 'death is

⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 173 (Stewart, J.); id. 227 (Brennan, J.); *Furman v. Georgia*, 408 U.S. at 242 (Douglas, J.); id. 269-70 (Brennan, J.); id. 329 (Marshall, J.); id. 383 (Burger, C.J.); id. 409 (Powell, J.). (Haney, 2008; M. J. Radin, 1978)

different', which places great emphasis on the irrevocability and severity of capital punishment, the Court's judicial interpretation and enforcement of the Bill of Rights was constantly viewed as an encroachment upon an area where the prerogative of state sentencing and legislative power should govern⁸.

A key difference between the administration of criminal justice in China and the United States is that the former operates within a unitary polity while the latter is subject to an intricate dynamic of federalism. As David Garland (2010) observes, the federal authority is subject to considerable restraints, leaving a greater role to state and local institutions for the enactment and enforcement of criminal law. In contrast to the decentralized, fragmented political and penal institutional structure in the United States, Chinese unitary bureaucracy has a centralized source of authority. Chinese national government confers relatively little regulatory and policy making power, in the realm of criminal justice, on provincial and local authorities. Narrowly speaking, provinces have no legislative power in the field of criminal justice⁹ and their law enforcement activities are subject to strong oversight from the above. Although governments, judicial authorities and law enforcement departments in China oftentimes have strong inclination to resist and contest national policies, the scale and scope of their resistance is relatively limited. In sum, the Chinese national-province relationship is fundamentally different from the federal-state relationship in the United States.

Chinese national and lower level political-penal authorities, in a very unique way, are both strong and fragile. Subject to erosion by decentralization of administration of economic and social affairs and legal-social reforms leading to greater individual autonomy at grassroots levels of the Chinese society since late 1970s, the strong political, penal, military and bureaucratic power held by China's central government (Swalne & Tellis, 2000) still thwarts potential challenges, threats and contests from below. And needlessly to say, the authoritarian system cloaks governmental institutions at the national level from meaningful checks and balances inherent to democratic processes. A radical form of localism and institutionalized devolution of sovereign power, a central characteristic of American political and penal (Boulanger & Sarat, 2005; Garland, 2010; F. E. Zimring, 2003) system, is absent in China.

This by no means suggests, however, that the citizenry in China is incapable of forming bottom-up countervailing force to offset governmental power. Process of negotiating, bargaining and compromises is central to Chinese political and penal decision making, although in a less-systemic, sporadic and spontaneous manner – the death penalty reform (Miao, 2013) is a current example. A conclusion we may draw from these observations that compared to the United States, it is politically and institutionally easier for Chinese governments to promote elite-led, top-down abolitionist reforms. And when such reforms are pursued in a piecemeal, incremental approach, a relatively thicker insulation from the vicissitudes of public sentiments and media backlash might be in pace because decision-making bodies are not located at a level closest to the people and local community. A possible further inference from this analysis is that, moving towards the elimination of the death penalty, the Chinese authorities may face less pressure to introduce LWOP-like punishment as a quid pro quo for public approval and acceptance.

⁸ Furman v. Georgia, 408 U.S. 238 (1972) (Burger, J., dissenting).

⁹ People's congresses at provincial levels are entitled to draft and pass administrative ordinances, rather than legislation.

A second key difference relevant to this discussion is the hierarchy of penal sanctions in China and the United States. China has a unique alternative punishment to the death penalty available in its penal law - the two-year suspended death sentence (aka death sentence with a two year reprieve). Capital offenders who 'need not be immediately executed' (article 48 of Chinese Criminal Code) may be sentenced to the suspended death penalty. Under this regime, prisoners spend two years in prison as a probation period, and if they do not commit intentional¹⁰ crimes during this period, their sentence would be commuted to life or fix-term imprisonment between 15 and 20 years, depend on whether they truly repent and whether they perform 'great deeds of merits'.

Even after a cursory reading, one may find that legal provisions specifying when capital defendants should be sentenced to the suspended death sentence and when prisoners serving suspended death should be commuted to life (or fix-term) imprisonment (or reverted to executions) are extremely vague. This provides reformers ample opportunities to redefine the wording of the law to expand the use of suspended death sentences, using them to divert inmates from capital to non-capital punishment. On the sentencing stage, an increasing number of prisoners who previously would be sentenced to immediate execution are instead considered eligible to serve the two-year suspended death sentence. In 2003, less than a quarter of capital offenders nationwide had their death sentences suspended¹¹ (Ma, 2003). The first year into the death penalty reform, in 2007, over 50% of the capital defendants were sentenced to suspended death sentences (Tian & Zou, 2007).

In addition to this significant growth 'at the front end', at the end of the two year period, the term of 'intentional crime' has been narrowly interpreted to enlarge the chance for prisoners to have their suspended death sentence commuted to life imprisonment or lesser forms of punishment. The result is that only an extremely small percentage of prisoners serving suspended death sentences have their sentences reverted back to executions (Ma, 2003; Xiao, 1999). It is therefore safe to assume that a large portion of the decline in executions in the past decade can be attributed to an increasing resort to suspended death sentences¹².

The suspended death sentence, as a *de facto* substitute for capital punishment in China, differs from LWOP in terms of both its severity and penological foundation. It has some form of rehabilitation and redemption built in - rather than merely retribution and incapacitation. The wide availability of this punishment in judicial practice for six decades certainly will continue to influence future penal reform in the future. It may habituate legal professionals, the public and victims and their families alike to thinking that suspended death is a workable, humane appropriate alternative which could serve sufficient penological purposes. On the other hand, although a much more lenient form of punishment, suspended death sentence is thought to be a 'moral equivalent' (Johnson & Zimring, 2009: 283) to capital punishment which, in a symbolical way, expresses a considerable amount of

¹⁰ The mental state of intention in Chinese criminal law is a broad term, similar to the combination of three degrees of *mens rea* in the Model Penal Code: knowledge, purpose, and recklessness. In practice, only prisoners who wilfully commit extremely serious crimes will be revert back to immediate execution.

¹¹ The rest of them (more than 75% of the total) were subject to immediate execution.

¹² Invented in the early days of Socialist state-making, this penal mechanism was designed to serve as a bulwark against miscarriage of justice, a utilitarian means to save the lives of prisoners and use them as productive work force, and to exemplify socialist humanism (Ma, 1999). It is therefore a sobering thought that even during a process of state building which involves fighting political and military rivals, humane sensibilities still emerged from within the regime, placing limits on the state's use of excessive penal power.

condemnation and stigma. It is in this sense that penal reforms in China will face a different reality from the United States, given the difference in penal law and traditions.

Law-making and adjudication in the field of criminal justice between China and United States are worlds apart. Legal enforcement processes, nonetheless, are even more different, including practices of incarceration in the two countries. In China, judicial corruption (Gong, 2004; Keyuan, 2000), and in particular, corruption and abuse of power in prison management (Liang & Lu, 2006; Seymour & Anderson, 1999), are widespread. The administration of suspended death sentences is a case in point. As mentioned above, scholars and professionals in China urged legislators to introduce harsher life imprisonment or increase the number of years prisoners serve under fix-term imprisonment, in order to fill a 'huge gap' in the ladder of severity between a death sentence and a suspended death sentence. This gap is, in fact, an issue of law enforcement, rather than a legislative loophole.

The average time served by inmates sentenced to suspended death sentences in China, up until 2011, was about 18 years¹³ (Huang, 2011). This figure might be much higher if post-conviction procedures were free from rampant arbitrary, corruptive and abusive use of power. In China, decisions on giving prisoners preferential treatments, i.e. commutation of their sentences to lesser forms of punishment, parole and a variant of supervised parole called 'serving sentences outside of prison', used to be made by judges on the basis of superficial reviews of documents submitted by correction facilities. Despite its formality as a judicial procedure, the reviews – mainly conducted by courts' 'judicial supervision' departments - rarely involve careful scrutiny of facts or thorough examination of the reliability of the documents provided by prison authorities. And this is partly due to the pressure of high caseload¹⁴ and limited legal resources allocated to the courts to decide on commutation, parole and serving-sentences-out-of-prison.

The fact that courts often merely 'rubber stamp' prison authorities' recommendations has led to a significant portion of prison population diverted from the mechanisms of commutation, parole and 'serving sentences outside prisons'. Out of the 1.64 million prison population in China in 2013, an annual number of nearly 500,000 have their sentenced commuted to lesser punishment (Zou, 2013). In an extreme case, a prisoner first served six years for a 12-year sentence and later nine years for a life sentence. How long the prisoners serve in prison depends, on a large extent, on their personal connections and whether and at what amount bribery is offered to prison managers. In the black market inside prison, there is a price tag put on almost everything prison officer offers to prisoners beyond prison rules – from helping prisoners to apply for commutation, parole and serving-sentence-outside-prison to purchasing goods from outside for them (Hua, 2014).

After media exposure of some high-profile cases, national legal authorities in recent years (2010-14) issued various rules to regulate procedures discussed above, aimed at making it harder for defendants to buy their way out of prison. These loophole-plugging regulations place restrictions on prisoners' eligibility for commutation, parole and 'serving sentencing

¹³ Huang Taiyun (2011), the deputy director of the Criminal Law Office of the Legislative Affairs Commission of the National People's Congress Standing Committee in China, has stated that, on the average, the period that criminal defendants serving a suspended death sentence we are released after 16 years of imprisonment in prison under fixed-term sentence. After adding the two years of a suspended death sentence to this, on top, we arrive at the 18 year average. Huang Taiyun (2011). Interpreting the Eighth Amendment to the Criminal Law in China, 2011 (6) People's Procuratorial (Renmin Jiancha) 5-20

¹⁴ The Judicial Supervision Department of an Intermediate Court in Guangdong decides on as many as 12,000 cases involving commutation and parole each year (Ouyang, 2014).

outside of prison', require judicial decisions to be made in open courts, and demand all hearings on such matters made public. Nevertheless, despite presence of abundant rules and regulations, with low respect for formal rules, widespread judicial and law-enforcement corruption and restraint of legal resources, it is unlikely that these regulations alone will substantially curb the diversion of prison population via penal or informal mechanisms in China.

What we have observed here is that the processes of law-making, adjudication and post-conviction enforcement of penal policies and laws in China and the United States are rooted in two completely different legal cultures. That difference springs from the mental structures underlie penal cultures and processes, incentives built into and punishment threatened by social-legal institutions, and environment and traditions constitute habitus. In our current discussion on practices of incarceration, Chinese people have a very thin respect for the rules. This is not because they are incapable of appreciating morality and legality or aligning their behavior to principles. Rather, it is because Chinese society is organized under a relationship-based, rather than rule-based rubric (Albrecht, Albrecht, & Hooker, 2009). Interpersonal bonds are cemented by reciprocal and mutual expectations and trust (*guan xi*). Thus social institutions, such as correction facilities, are vulnerable to corruptions because logical and rational rules *per se* do not command respect and authority. This stands in contrast with the firm belief in and strict adherence to legal formality in the United States and other Western countries.

Conclusion

The aim of this article is to present an alternative theory for understanding possible collateral consequences and limitations of Chinese capital punishment reform, pending possible revisions and enrichment by empirical fieldwork in the next stage of my research. So far I have traced the beginning of the end of the death penalty in China and United States, in a comparative way. In the United States, the line between the death penalty and other non-capital forms of punishment, in particular LWOP and *de facto* LWOP, is anything but bright. In China, the demarcation between the death penalty and suspended death is blurry in court rooms but clearer in practice. The gap between the two forms of punishment, however, seems to begin to close up with the advance of the death penalty reform.

Going back to the questions I have raised in the Introduction, will present and future penal developments lead to further entrenchment of long-term imprisonment in China? What about mass incarceration? My tentative answer is 'possible' to the first question, and 'probably no' to the second. We have found that a similar pattern of penal evolution holds in countries as different from the United States as China - progressive death penalty reform, increasing prison population and penal populism. We have also found that differences are significant – localist federalism v. centralized unitary system, LWOP v. suspended death sentence, and corruption and diversion v. legal formality. There are some legal, socio-economic and political variables that I could not articulate here due to limitation of length, such as restraint of legal and financial resources in the administration of criminal justice, which is significant as the re-allocation of penal resources coincides with a readjustment of China's existing penal structure during the transition from the death penalty to incarceration.

These factors need to be read together. For instance, although penal decision making bodies in both China and United States are vulnerable to popular influences, penal discourses and

debates on the use of capital punishment and other severe penal sanctions in China are not as strongly tied to debate on vertical distribution of power as in the United States. And so on and so forth. As a result, Chinese reform may differ from the American reality. The experience of the latter exemplifies that in order to get rid of the death penalty, reformers have to normalize and nurture a lesser evil, at some substantial social, economic and moral costs. The differences between China and United states suggest that even if a harsher form of life imprisonment is introduced into the Chinese legislation at a stage when capital punishment for homicide is abolished, such a sanction will at most be a LWOP-lite, and the use of such a punishment will probably be more contained in scale. Given China's legal tradition and political as well as social institution, the new punishment, if any, may be more socially, morally and economically sustainable. That is an important lesson China should learn from the United States.

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Appendix

METHODOLOGY (from my original research proposal):

The project will be based on an inductive methodology combining qualitative interviews, archival research and library-based studies. A literature review will provide the basic contextual knowledge for the empirical fieldwork. The empirical component will mainly be based on qualitative interviews with legal professionals as well as prisoners. Using the contacts developed during my previous research, I plan to conduct 20 elite interviews with legislators and judges in Beijing, China during the first stage of my fieldwork. Simultaneously, archival research composed of compiling data and documentary evidence on the administration of suspended death and life imprisonment in China will be used to triangulate information gathered from the interviews.

The second stage of my fieldwork will be based in four provinces across China: Guangdong, Henan, Yunnan, and Shanghai. The selection reflects regional diversity in the degree of socio-economic development and a geographic disparity in the scale of sentencing severity. In total, I will interview 20 prisoners serving suspended death sentences – which will provide their insiders' views on the everyday prison life – and 40 prison officers. As a supplement to the data drawn from interviews with judges at the national level, 20 semi-structured interviews with judges at provincial and intermediate levels will elicit some nuanced information about changing sentencing practices in the post-reform era. Being realistic about the difficulties of negotiating access, I am nevertheless confident that my previously-established networks with legal elites in these four provinces will facilitate the establishment of rapport with potential interviewees.